

83 - 2019

No. _____

Office - Supreme Court, U.S.

FILED

JUN 1 1984

ALEXANDER L. STEVAS,
CLERK

**IN THE
SUPREME COURT
OF THE UNITED STATES**

October Term, 1984

EDWARD M. ZOLLA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT**

**ROBERT H. WYSHAK
LILLIAN W. WYSHAK**
8907 Wilshire Boulevard
Beverly Hills, CA 90211
(213) 273-2044

Attorneys for Petitioner

QUESTIONS PRESENTED

I

Whether reasonable due diligence in determining a taxpayer's address for purposes of mailing a statutory notice of deficiency in income taxes requires the Internal Revenue Service (IRS) to use the last home address, at which an IRS' representative had interviewed the taxpayer.

II

Whether the constructive notice to the world, as to a taxpayer's address, given by a Notice of Federal Tax Lien recorded in July, 1972 by the IRS with the County Recorder for Los Angeles County is binding on the IRS. This Notice of Tax Lien showed the taxpayer's address as 303 N. LaPeer, Beverly Hills, Ca. rather than 902 N. Bedford, Beverly Hills, the address used by the IRS for

The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The second part of the paper is devoted to a discussion of the various theories of the origin of life. It is shown that the most plausible theory is that of spontaneous generation. The third part of the paper is devoted to a discussion of the evidence in favor of spontaneous generation. It is shown that the evidence is very strong and that it is not possible to explain the origin of life in any other way. The fourth part of the paper is devoted to a discussion of the implications of the theory of spontaneous generation. It is shown that the theory has important implications for our understanding of the history of life on earth.

mailing notices of deficiency, which were never received. The taxpayer had moved from Bedford to 303 N. LaPeer in October, 1971.

III

Whether the IRS should be required to maintain one central file for taxpayers' addresses and changes of addresses, as suggested in Welch v. Schweitzer, 106 F.2d 885 (9th Cir. 1939), and provide a change of address form for this purpose.

IV

Whether the District Court in ruling on the United States' motion for summary judgment erred in considering the self-serving, conclusory opinions based on hearsay and the unauthenticated, uncertified documents attached to the United States' Responses to Interrogatories.



TOPICAL INDEX

	<u>Page</u>
QUESTIONS PRESENTED	i
Table of Authorities	iv
OPINION BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
CONCISE STATEMENT OF FACTS	4
REASONS FOR GRANTING THE WRIT	12
I IN RULING THAT IRS SHOULD NOT HAVE TO MAINTAIN A CENTRAL FILE FOR THE SYSTEMATIC RECORDING OF ADDRESS IN- FORMATION, THE COURT OF APPEALS FOR THE NINTH CIRCUIT HERE RENDERED A DECISION IN CONFLICT WITH LONG- STANDING OPINIONS RECOMMENDING THAT THE IRS DO SO	14
II THE 1970 AMENDMENT TO FED.R.CIV.P. 33 WAS NOT INTENDED TO PERMIT A PARTY'S SELF-SERVING HEARSAY RE- SPONSES TO INTERROGATORIES TO SUP- PORT A MOTION FOR SUMMARY JUDGMENT	24
CONCLUSION	26
APPENDIX	

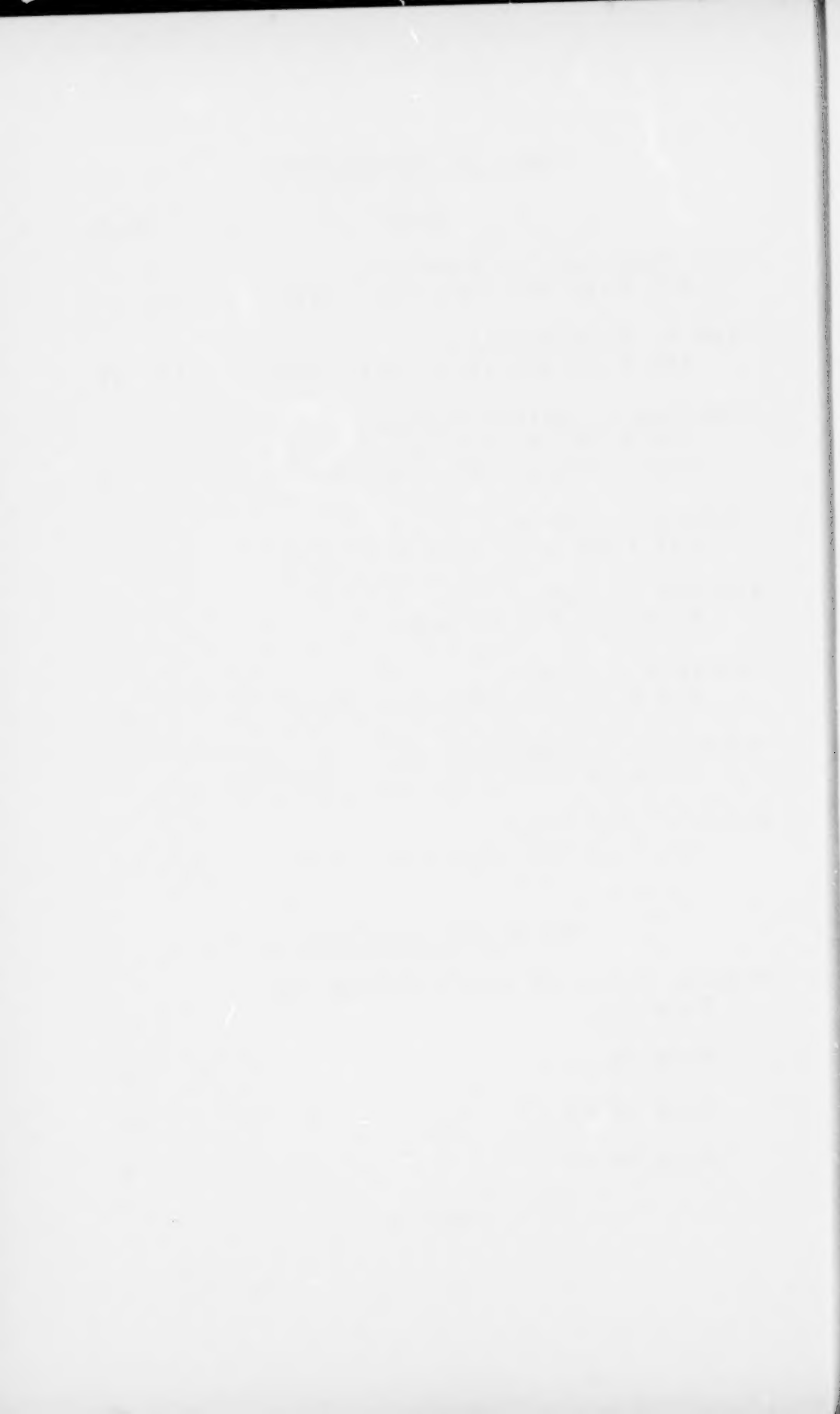


TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Cool Fuel Inc. v. Connett, 685 F.2d 309 (9th Cir. 1982)	16, 17
Crum v. Commissioner, 635 F.2d 895 (D.C. Cir. 1980)	17, 18
DeWelles v. United States, 378 F.2d 78 (9th Cir.) cert. denied 389 U.S. 996	22, 23, 24
Johnson v. Com'r, 611 F.2d 1015 (5th Cir. 1980)	20, 21
Kuebler v. Com'r ¶ 79,095 P-H TC Memo	20
Maxfield v. Com'r, 153 F.2d 325 (9th Cir. 1946)	15
McPartlin v. Com'r, 653 F.2d 1185 (7th Cir. 1981)	18, 19, 20
Welch v. Sweitzer, 106 F.2d 885 (9th Cir. 1939)	14, 17

Rules and Statutes

Federal Rules of Civil Procedure, Rule 32	25
Rule 33	24
Rule 56(c)	24
Rule 56(e)	4



Federal Rules of Evidence, Rule 803(8)	25
Internal Revenue Code, 274(a) of the Revenue Act of 1926, 44 Stat. 55	13
Title 26 United States Code, Section 6212(a)	2, 7
Section 6212(b)	19
Section 6212(b)(1) and (2)	3
Title 28 United States Code, Section 1254(1)	2

Text

4A Moore's Federal Practice, pp. 33-173 et seq., ¶ 33.29	25
---	----



IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1984

EDWARD M. ZOLLA,

Petitioner,

vs.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner hereby petitions this Court
for a writ of certiorari to the United States
Court of Appeals for the Ninth Circuit.



OPINION BELOW

The opinion of the Court of Appeals (Appendix, infra) is reported at 724 F.2d 808.

JURISDICTION

Jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

The opinion of the Court of Appeals was filed January 24, 1984 and the Order Denying the Petition for Rehearing on March 5, 1984. A copy thereof is in the Appendix.

STATUTES INVOLVED

Internal Revenue Code, 26 U.S.C.

SEC.6212. NOTICE OF DEFICIENCY.

(a) IN GENERAL--If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 42 or 43, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.



(b) ADDRESS FOR NOTICE OF
DEFICIENCY.--

(1) INCOME AND GIFT TAXES
AND TAXES IMPOSED BY
CHAPTER 42.--In the

absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by subtitle A, chapter 12, chapter 42, chapter 43, or chapter 44 if mailed to the taxpayer at his last known address, shall be sufficient for purposes of subtitle A, chapter 12, chapter 42, chapter 43, chapter 44, and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

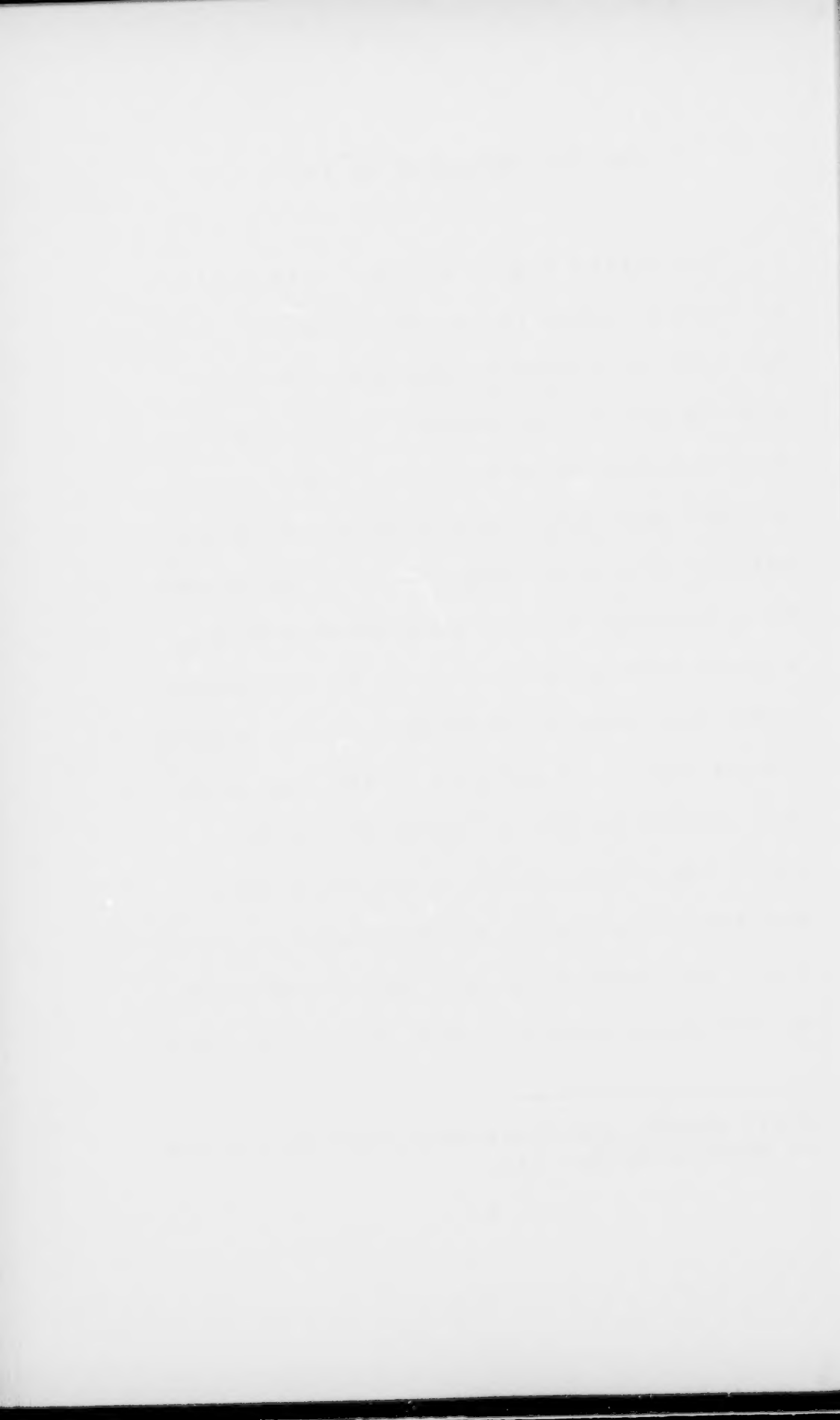
(2) JOINT INCOME TAX

RETURN.--In the case of a joint income tax return filed by husband and wife, such notice of deficiency may be a single joint notice, except that if the Secretary has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, a duplicate original of the joint notice shall be sent by certified mail or registered mail to each spouse at his last known address.

CONCISE STATEMENT OF FACTS

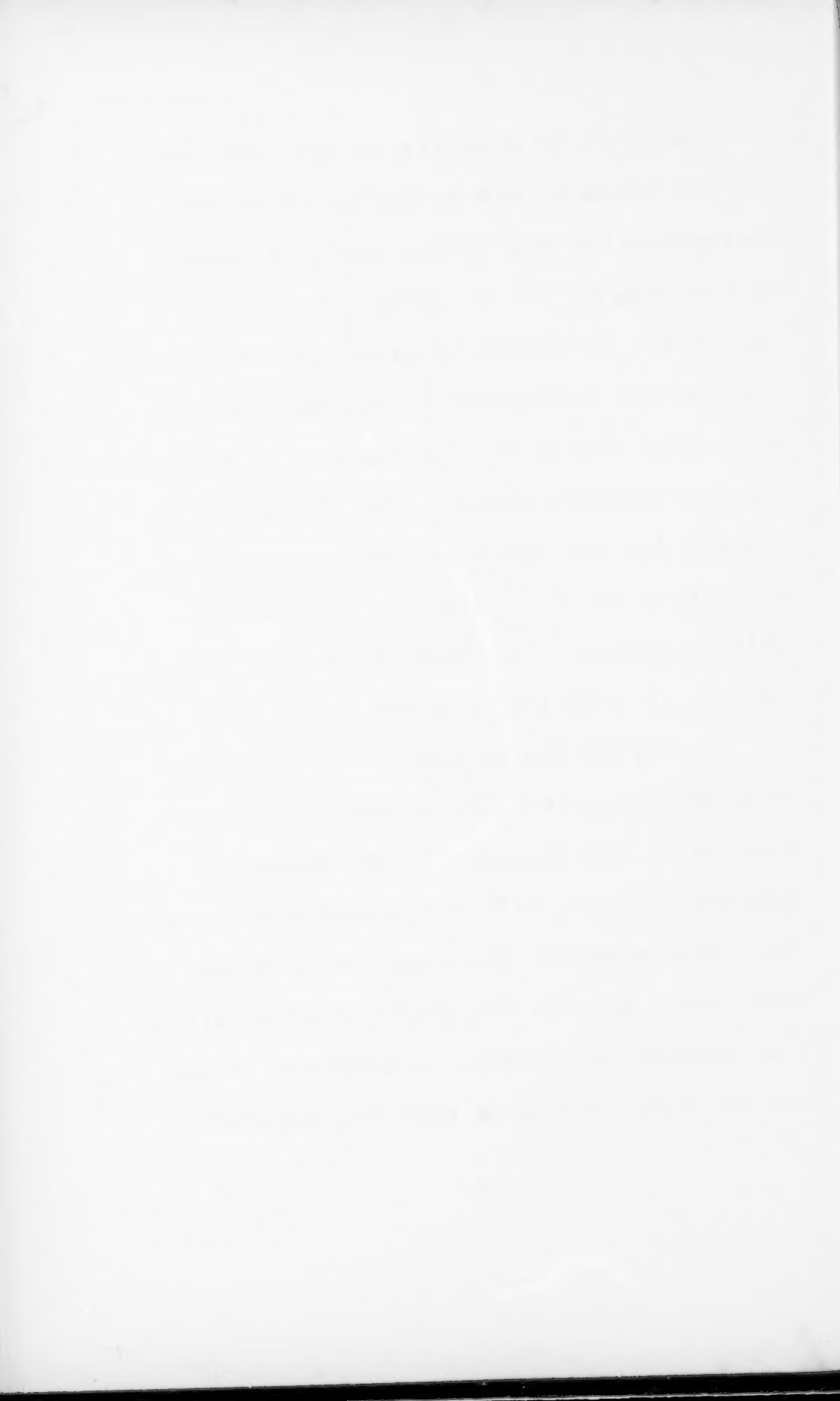
The United States brought this action to reduce income tax assessments for 1968 and 1969 to judgment. The District Court granted the United States' motion for summary judgment by determining mixed issues of fact and law primarily relating to the mailing of a statutory notice of deficiency to a taxpayer to his "last known address," a procedural prerequisite to an assessment under the Internal Revenue Code. In ruling that a notice of deficiency had been properly mailed to 902 N. Bedford^{1/} in June, 1973, the court relied on objectionable matters not properly authenticated or certified, not under oath, and not encompassed by the requirements of Fed. R. Civ. P. 56(e).

^{1/}All street addresses mentioned herein are in Beverly Hills, Cal.



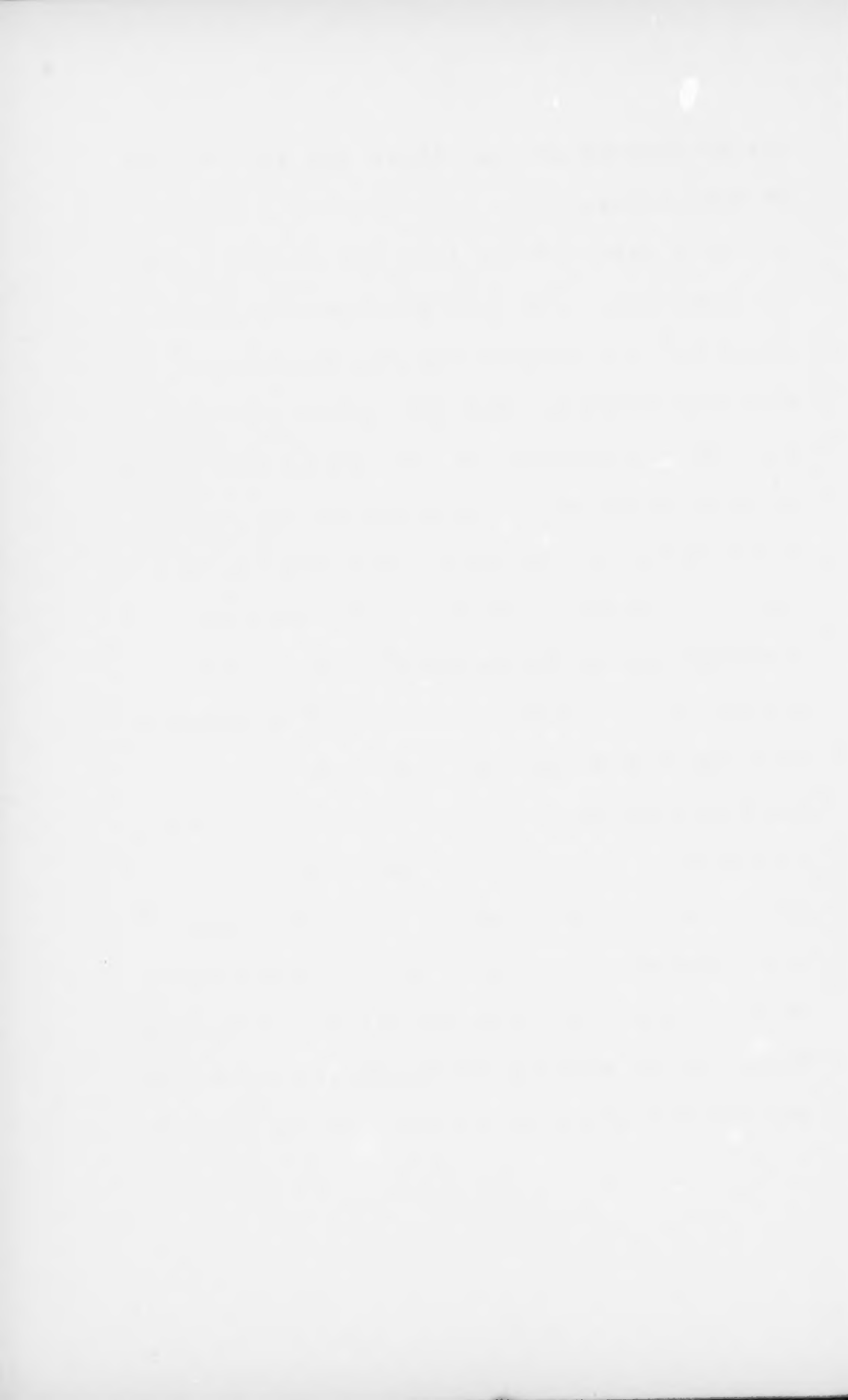
It ruled that as a matter of law, the IRS was not bound by the knowledge of an IRS' representative who interviewed the taxpayer at his home on 303 N. LaPeer in July, 1972 to collect an unrelated assessed tax liability and who consequently recorded a Notice of Federal Tax Lien with the County Recorder for Los Angeles, showing the 303 N. LaPeer address for the taxpayer. The taxpayer had moved from 902 N. Bedford on October 31, 1971 to LaPeer. The addresses on the tax returns in question were 808 N. Beverly.

The United States admitted in response to interrogatories that it had no information as to who determined the taxpayer's address in June, 1973 and consequently what such determination was based on to establish that there was due diligence in ascertaining the taxpayer's address. In addition, there was no direct evidence that any deficiency



was determined or that there was any "notice of deficiency."

This case differs from the usual in that the administrative file produced for depositions did not contain any correspondence with the taxpayer, any IRS' audit reports, any IRS' workpapers, any copies of any notice of deficiency or the original or any copy of the taxpayer's most recently filed tax return, contended to be for 1970. The only contemporaneous documentary evidence submitted to the Court was a copy of a postal form 3877, stating that there was a certified mailing by IRS of documents described in the form as notices of deficiency to 902 N. Bedford on June 11, 1973. However, the taxpayer never received any such notices of deficiency, and the IRS did not deny this. There was no showing whatsoever to establish any due diligence on the part of the unknown

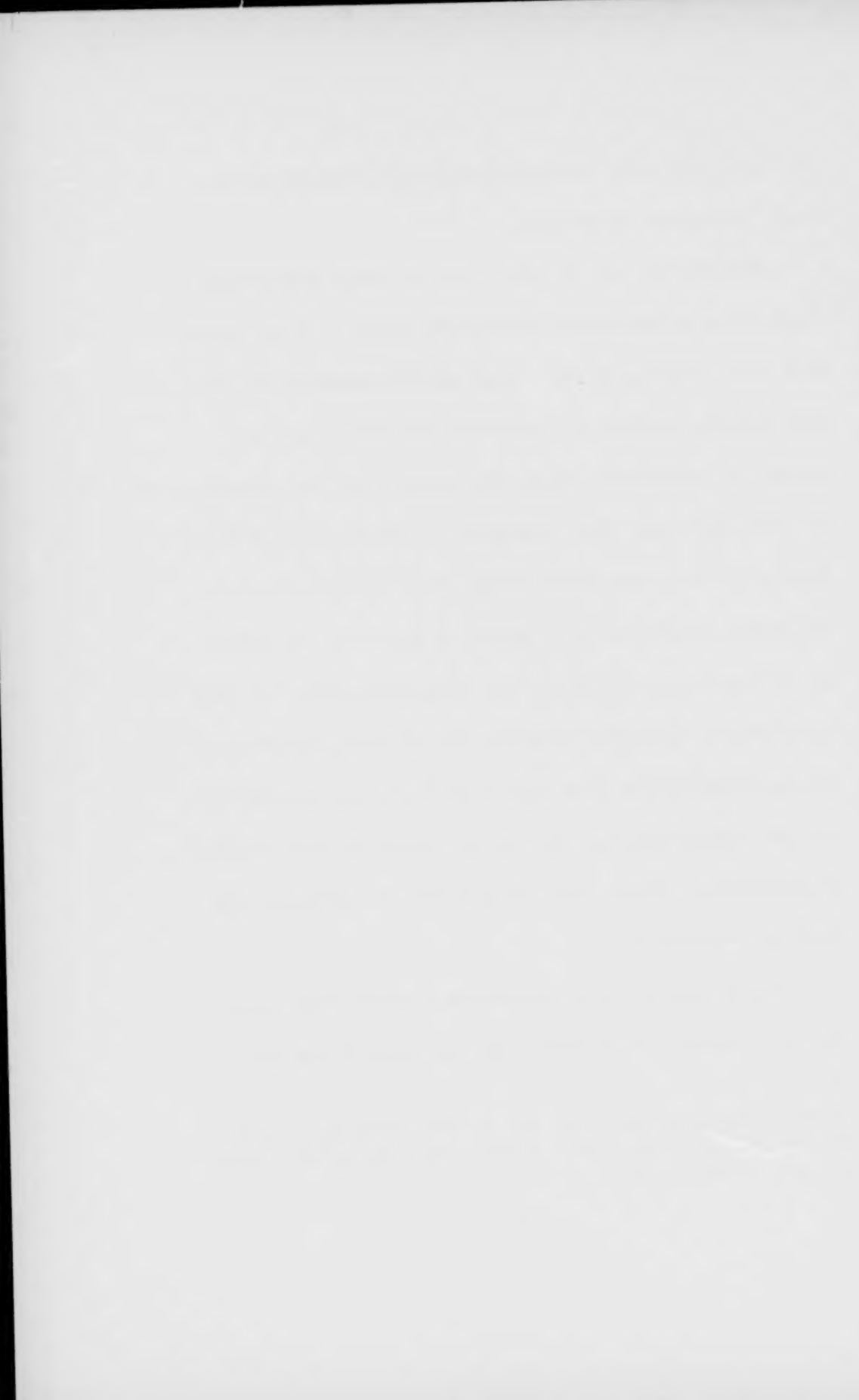


IRS person who determined the taxpayer's most current address.

There is no doubt, as it was admitted, that the examining revenue agent, Sam Park, did not "determine" any deficiencies^{2/} and was never asked by anyone as to the taxpayer's address. His declaration in support of the motion for summary judgment and his deposition revealed that the computations he submitted were prepared by him in 1980 as a reconstruction, at the request of the Assistant United States Attorney, working backwards from the outstanding assessments. It is interesting to note that these reconstructions show the taxpayer's address as 808 N. Beverly.

Park never corresponded with the taxpayer, never visited him at his home or

^{2/} The determination of a deficiency is a work of art derived from the Internal Rev. Code, § 6212(a).



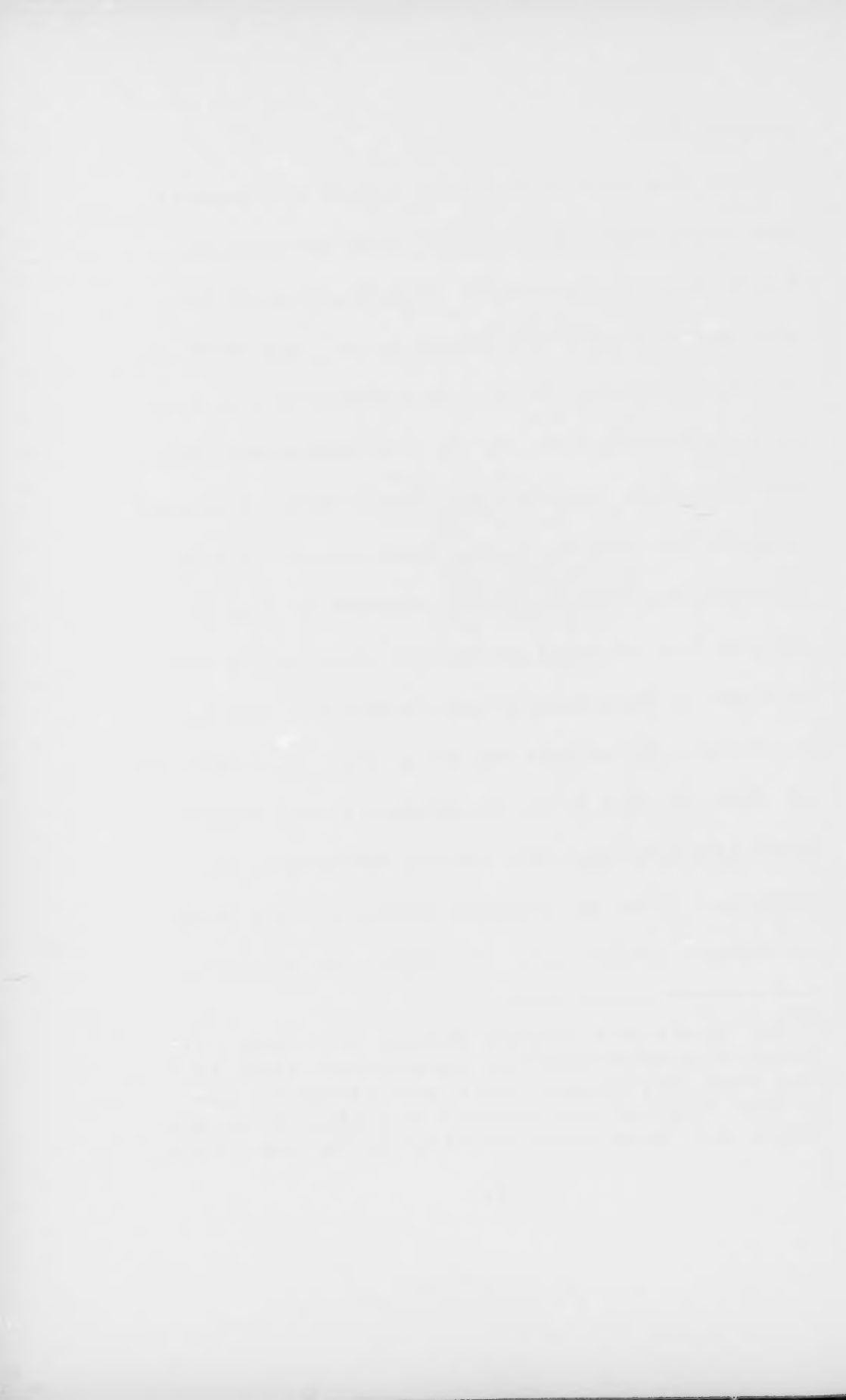
office, and never mailed him anything. He telephoned the taxpayer several times and was referred to an accountant. Due to the accountant's failure to provide any substantiation except for some medical expense checks, Park disallowed every deduction claimed. However, he admitted that he never mailed a copy of his report to the taxpayer, and that he had nothing to do with the actual and physical issuance of any notice of deficiency to the taxpayer and had never seen any notice of deficiency addressed to Zolla. Park indicated that he solicited copies of the 1968 and 1970 returns from the accountant. Although it was contended that the 1970 return was filed October 27, 1971 and bore the Bedford address, no competent evidence was before the Court to show what any 1970 return said or that secondary evidence was



proper.^{3/}

If the District Court erred in ignoring the knowledge of the IRS' representative, R. D. Leslie, who made an appointment to see and did see the taxpayer at his home on LaPeer in July, 1972, then there was a triable issue of fact as to the addresses for the taxpayer in the IRS' computers. Although demand for his file was made prior to his deposition, the file maintained by him during his several contacts with Zolla to collect a delinquent tax liability was not produced. By referring to a copy of a Notice of Federal Tax Lien he prepared and filed with the Los Angeles County Recorder, he recalled that he visited Zolla at his home on LaPeer about July 25, 1972. He testified

^{3/}The Assistant United States Attorney offered his self-serving conclusion that it had been destroyed. This was patently improper hearsay conjecture and should in any event not have been considered by the Court.

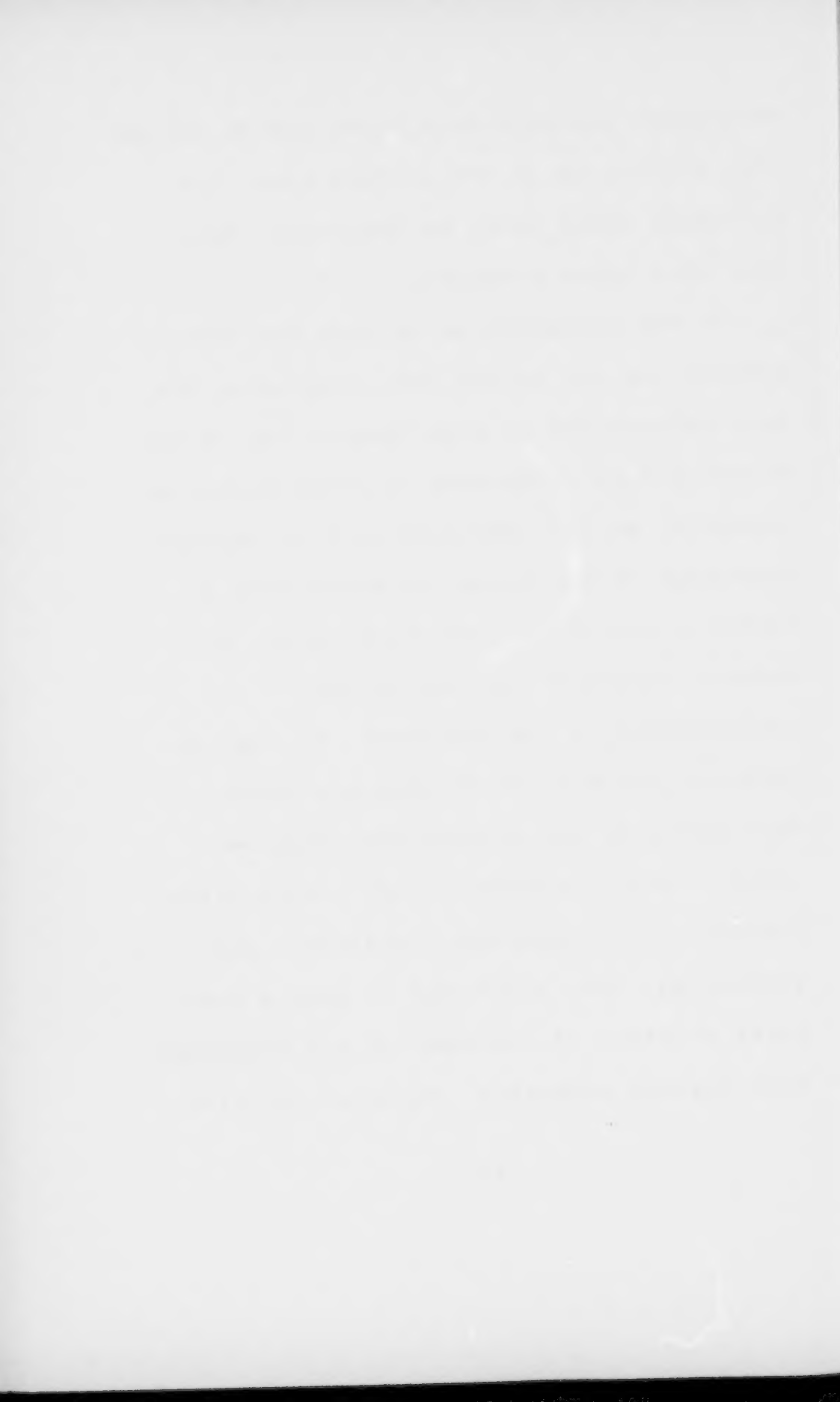


on deposition that he had received from the IRS Center at Fresno, Cal., a TDA (taxpayer delinquent account card), computer generated, showing the taxpayer's name, address, social security number, the amount of the tax liability, the period in question, etc., and it was his job to collect it from the taxpayer. At that time he was not aware of any other address for Zolla other than 303 N. LaPeer. He observed that if a field call revealed an address different from that on the TDA, the TDA would be corrected and the new address would be fed back into the computer. Although it was the general rule to retain all TDA's in the file until a liability was satisfied, none was produced for his deposition. The only document produced pursuant to discovery requests showing the LaPeer address was a publicly recorded notice of tax lien. He stressed that if



delinquent accounts were under active collection efforts as in the instant case, the documents would never be destroyed. Yet, they were never produced.

It was contended below that the LaPeer address was not in the IRS' computers. The only information in that respect was in the United States' Responses to Interrogatories, signed by an IRS' employee with no personal knowledge of the facts, to which were attached uncertified, unauthenticated, and unsworn copies of various documents not incorporated in the Responses. Written objections thereto, which were not ruled on, were based on the grounds that they were insufficiently authenticated, insufficient foundation, incompetent, irrelevant and immaterial. They purported to show a computer printout of information and addresses from various computers. There was nothing



else to impeach Leslie's testimony that he secured the LaPeer address from a computer-generated TDA. This, per se, constituted a triable, material issue of fact, since the TDA was issued by the computer in July, 1972 subsequent to the filed income tax returns, and Leslie was uncontradicted in his testimony that he was unaware of any other address for Zolla but LaPeer.

Both Park and Leslie admitted that they were unaware of any IRS' form or procedure to be used by a taxpayer to effect a change of address.

REASONS FOR GRANTING THE WRIT

This Court has never ruled on the appropriate criteria and parameters to be used by IRS in determining a taxpayer's last known address for purposes of mailing a statutory



notice for deficiency. Although comparable statutory language has been in the Internal Revenue Code for close to 60 years (sec. 274(a) of the Revenue Act of 1926, 44 Stat. 55), there is still considerable confusion as to the appropriate criteria in the case law. The Tax Court of the United States issues opinions almost weekly bearing on the sufficiency of the notice and the propriety of the address used.

The opinion below is inconsistent with not only opinions of the 5th, 7th and D.C. Circuit, but also in conflict with decisions of other panels of the 9th Circuit, on the question of whether the knowledge as to the taxpayer's home address of an IRS' representative seeking to collect a tax should be imputed to the person who directs the issuance of a statutory notice of deficiency



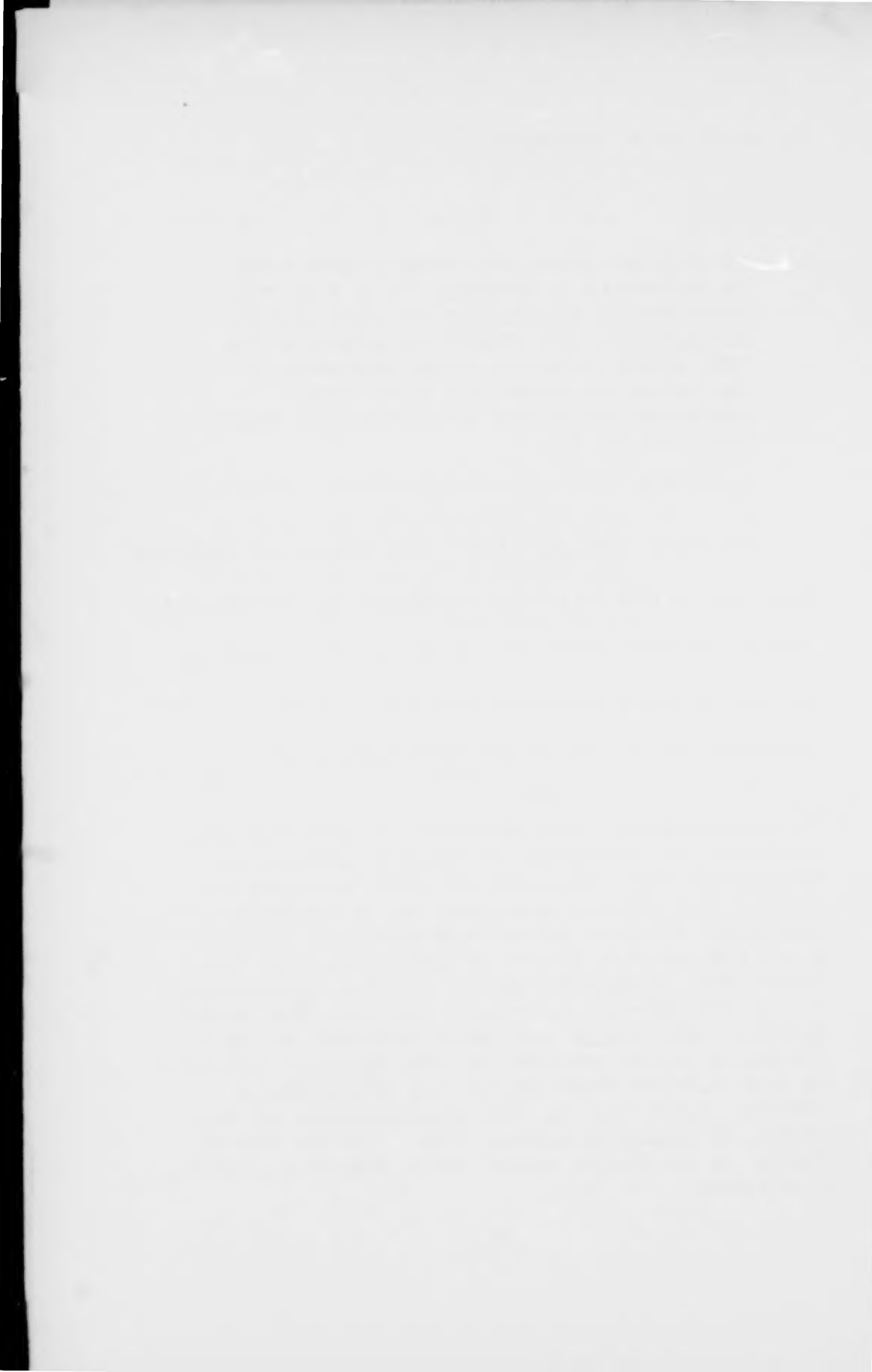
by mail to a taxpayer.^{4/}

I

IN RULING THAT IRS SHOULD NOT HAVE TO MAINTAIN A CENTRAL FILE FOR THE SYSTEMATIC RECORDING OF ADDRESS INFORMATION, THE COURT OF APPEALS FOR THE NINTH CIRCUIT HERE RENDERED A DECISION IN CONFLICT WITH LONG-STANDING OPINIONS RECOMMENDING THAT THE IRS DO SO.

As long ago as 1939, the Court of Appeals for the Ninth Circuit in Welch v. Schweitzer, 106 F.2d 885, 887 (9th Cir. 1939) ruled in an early case testing the sufficiency of the address on a notice of deficiency that

^{4/}Colloquially, the section in the District Director of Internal Revenue's office responsible for issuance of such notices is called the 90-day section, as a taxpayer has only 90 days after the mailing of such a notice within which to petition the Tax Court for redetermination of the deficiency. It is the 90-day section, and not the audit agents, who issue and mail notices of deficiency after review of the agents' reports by the Review Section of the Director's office, contrary to the conclusions of the Court of Appeals below. 724 F.2d at 810-1. There is no doubt about this administrative hierarchy.

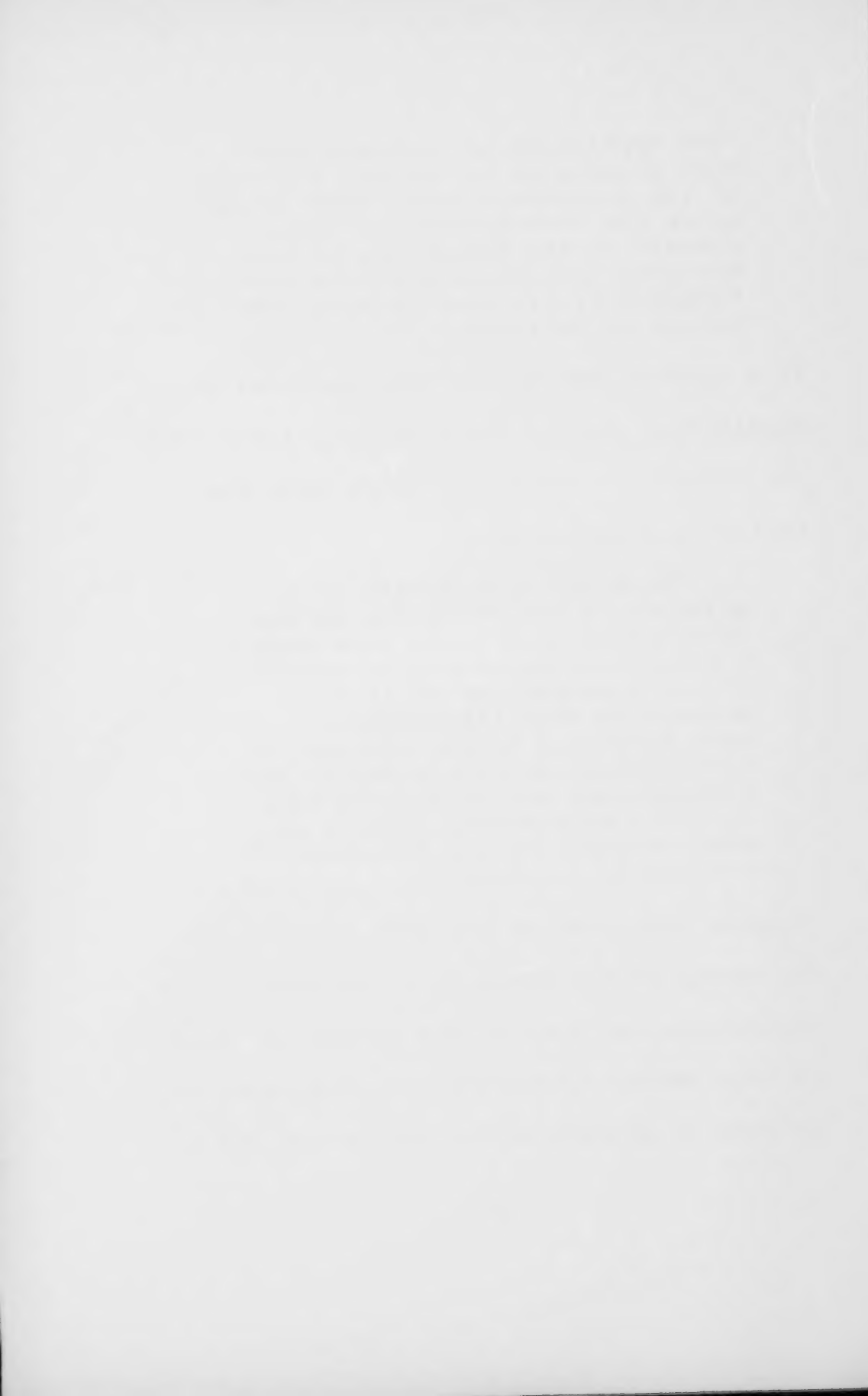


"The application of ordinary business principles to the tax business of the government would seem to require the Commissioner to avail himself of the facilities of his business organization in the performance of his duty to mail the notice of deficiency."

This opinion was quoted with approval in Maxfield v. Com'r, 153 F.2d 325, 326-7 (9th Cir. 1946), in which the Court made the following suggestion:

"With the wide powers of regulation of the Secretary of the Treasury he well could have made a regulation providing an agency of the Commissioner of Internal Revenue to whom the taxpayer could make known his latest address. No such regulation is claimed by the Commissioner and we know of none If, as claimed, this is an embarrassment to the Treasury, its remedy is plain."

To this date nothing has been done by the Secretary of the Treasury to implement this suggestion, as both of the agents involved in this matter testified that they knew of no form or procedure for giving the IRS a



change of address.

More recently in Cool Fuel Inc. v. Connett, 685 F.2d 309 (9th Cir. 1982), the Court invalidated a notice of deficiency mailed to the address on the returns in question, since the taxpayer had later provided the Service Center computer a different address for employment tax return purposes. The Court rejected the IRS' contention that the knowledge of the Service Center should not be imputed to the audit division and held that it should. The Court concluded that

"the audit division had a duty to exercise reasonable diligence in ascertaining the correct address. Crum v. Commissioner, 635 F.2d 895 (D.C. Cir. 1980). Had the audit division done so, it would have realized that the Paramount address was the last known address and could have effectuated notice. Failure of the IRS to do this is a violation of the statutory notice procedure." 685 F.2d at 313.



The Court reached this conclusion in reliance on the above cited language from Welch v. Schweitzer, supra. The Court below is in conflict with the views of Cool Fuel.

The Crum case, cited in Cool Fuel, supra, used the criterion as whether the IRS acted reasonably in mailing the deficiency notice. Since the Office of International Operations (OIO) in the Philadelphia Service Center knew the taxpayer's correct address and had sent collection notices to the taxpayer at the correct address, use of the address on the returns in question was considered unreasonable by the Court.

"Crum could not be expected to appreciate the inner workings of the IRS, and particularly the separate responsibilities of OIO and the Philadelphia Service Center, with regard to giving adequate notice of his change of address, especially since Agent Kristianson never communicated with Crum during the course of the audit...Further, during the time period relevant to this case the IRS was converting

to the use of automated data processing, but any resultant breakdown in communications and ability to correlate the collection and audit functions of the IRS was not the fault of the taxpayers such as Crum and they should not be made to suffer for it. An innocent taxpayer should not be penalized because the tax collector neglects to tell his right hand what his left is doing." 635 F.2d at 900.

The reasoning and analysis of the Crum court was adopted in McPartlin v. Com'r, 653 F.2d 1185 (7th Cir. 1981). Factually the McPartlin case has many similarities to the case at bar. Approximately 6 months prior to the mailing of the deficiency notice there, the Service Center communicated with the taxpayers at their correct address; a criminal IRS' investigator who had worked on the taxpayers' case knew their correct address; the taxpayers did nothing to conceal their address; there was no return receipt for the notice of deficiency; and there was a Notice of Tax Lien filed with



the taxpayers' correct address. These factors in McPartlin compelled the conclusion that the deficiency notice had not been mailed to the "last known address" within the meaning of Sec. 6212(b).

In footnote 8, the Court noted:

"(A) taxpayer should not be expected to appreciate the separate responsibilities of the Commissioner's Service centers and his offices located within the service centers. Crum v. Commissioner, 635 F.2d at 900. This is particularly true when the Commissioner has apparently not sought to inform taxpayers by way of the numerous channels of communication at his disposal--e.g. tax forms and informational publications--that a change of address should be communicated by a taxpayer at a certain office of the Commissioner. Moreover, in this age of sophisticated computer information storage and retrieval systems, the Ninth Circuit's position can hardly be deemed to impose an unreasonable burden upon the Commissioner." 653 F.2d at 1190.

Although the Court of Appeals below cited McPartlin (724 F.2d at 810), its opinion is squarely in conflict with it and failed to



distinguish it in any way, thereby contributing to the lack of harmony in the authorities referred to in fn.7 in McPartlin, 653 F.2d at 1179.

A close reading of McPartlin shows that that Court of Appeals rejected the reasoning of the Tax Court Memorandum decision (which has no value as precedent), on which the Ninth Circuit panel below and District Court based their reasoning. Kuebler v. Com'r, ¶ 79,095 P-H TC Memo.

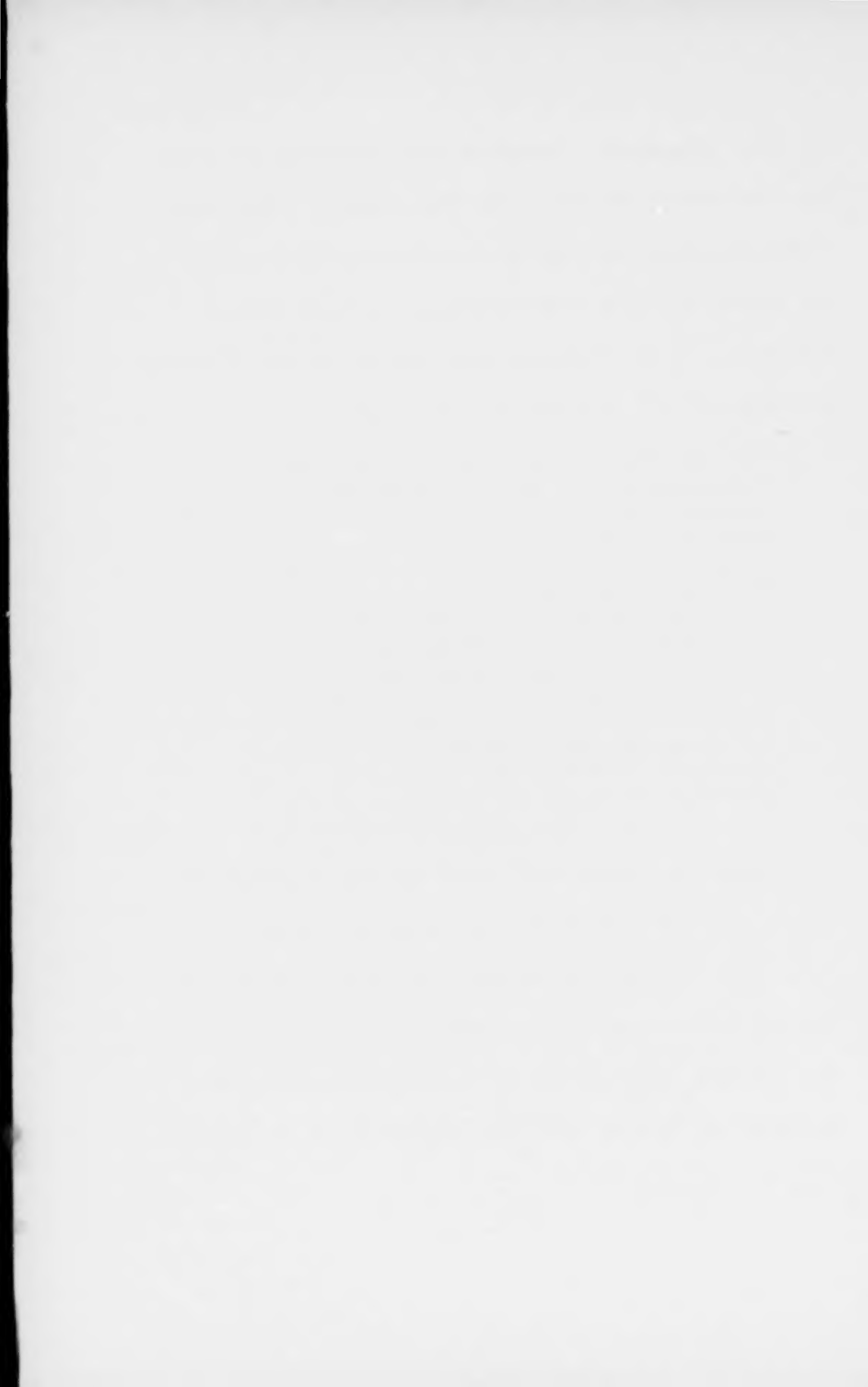
The conclusion of the Seventh Circuit in McPartlin is consistent with that of the Fifth Circuit in Johnson v. Com'r, 611 F.2d 1015 (5th Cir. 1980). In the Johnson case, the taxpayer was similarly the subject of a criminal investigation and the special agent there was aware of the taxpayer's correct address. The notice of deficiency to the address on the returns was never delivered



to the taxpayer. Despite the finding of fact by the lower court, the Tax Court, that the Commissioner had used reasonable diligence in ascertaining the taxpayer's last known address, this finding was found to be clearly erroneous and a reversal ensued.

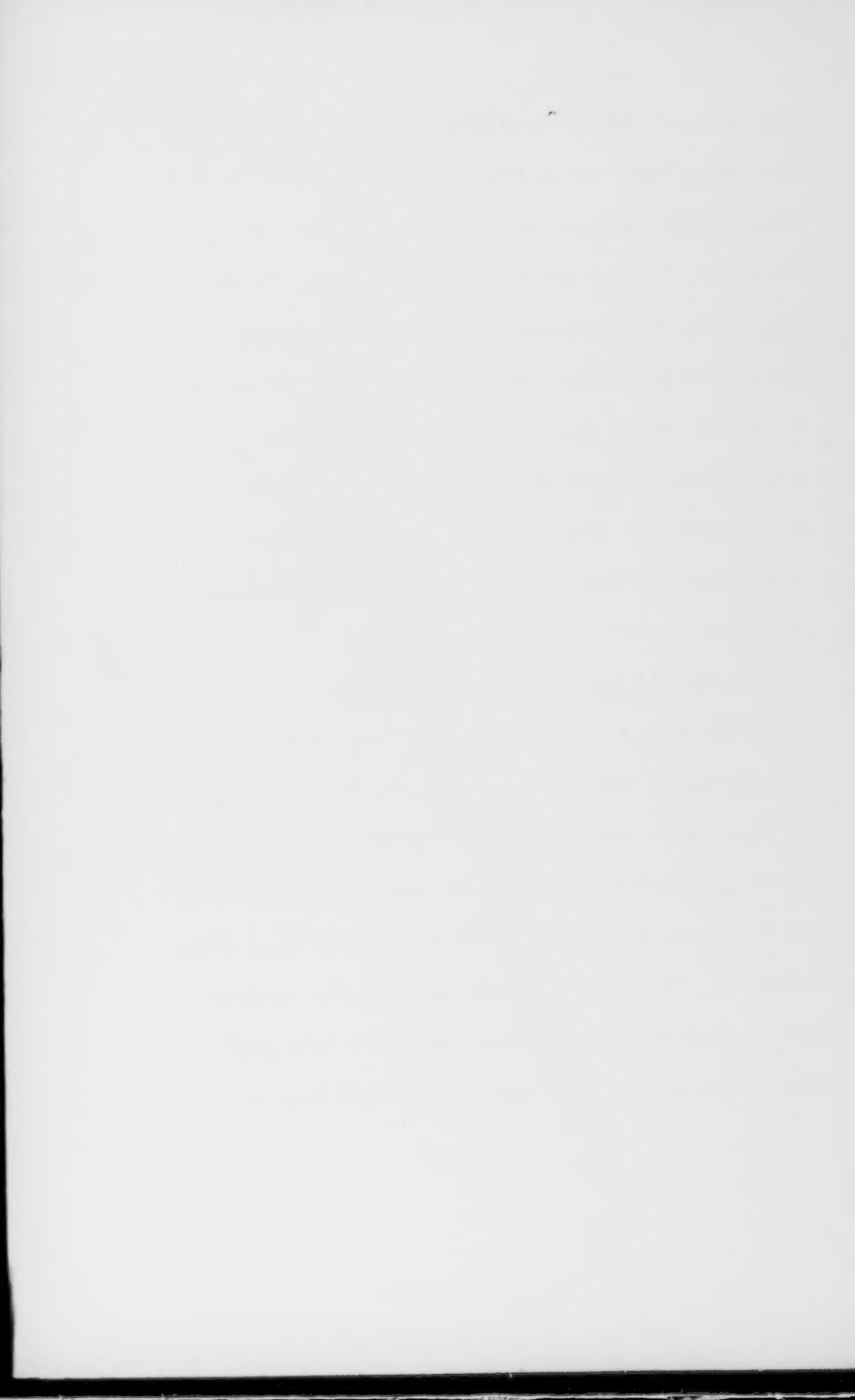
"It is clear that certain of the Commissioner's agents knew of the change (of address) since they were at taxpayer's office on numerous occasions in connection with an ongoing criminal tax investigation directed at taxpayer. Although it is not clear whether the audit division and the criminal investigation division were aware of each other's activities, it appears that the change of business address was known by someone working on taxpayer's file." 611 F.2d at 1016-17.

Despite these decisions in the Courts of Appeals, the Court below ruled contrary to this well-reasoned authority that "it would impose an unreasonable administrative burden on the IRS" (724 F.2d at 811) to have a central file for the maintenance of taxpayers'



addresses. This conflict in the Circuits has provided no guidance for the Tax Court, which most often decides the "last known address" issue on an ad hoc basis. This Court should now provide the necessary guidance and require the IRS to publish a form for this purpose to avoid suffering the consequences of imputation of the knowledge of the various sections and branches of the IRS to the 90-day section in issuing deficiency notices.

In DeWelles v. United States, 378 F.2d 78 (9th Cir.), cert. denied 389 U.S. 996, the address on the last filed return was PO Box 157, Encino, Cal. There, the revenue agent called the taxpayer and met with him at his residence at 2177 Live Oak Dr., Los Angeles. The Court concluded that, since the taxpayer was living at Live Oak when interviewed by the agent, as did Zolla on



LaPeer, the IRS was justified in using the Live Oak address for a deficiency notice, rejecting the contention that the address on the last filed return, Box 157, Encino, should have been used.

Contrary to the DeWelles ruling, the Court of Appeals in the case at bar appears to have adverted to the most recently filed return rule by pointing out that Zolla filed a 1970 return in October, 1971, showing the 902 N. Bedford address. There was no competent evidence introduced below to prove the content of any 1970 return. Neither the original return nor competent secondary evidence was before the District Court in that respect. Even assuming for the sake of argument that the address on the most recently filed return was on Bedford, it is submitted that the later July, 1972 interview at taxpayer's home on LaPeer and the



recording of a Notice of Federal Tax Lien with the County Recorder showing the LaPeer address for Zolla required the IRS to have used that address, pursuant to the Ninth Circuit's ruling in DeWelles. Thus, there is a conflict even within the Ninth Circuit, in addition to the 5th, 7th and D.C. Courts of Appeals.

II

THE 1970 AMENDMENT TO FED.R.CIV.P. 33 WAS NOT INTENDED TO PERMIT A PARTY'S SELF-SERVING HEARSAY RESPONSES TO INTERROGATORIES TO SUPPORT A MOTION FOR SUMMARY JUDGMENT.

Although Fed. R. Civ. P. 56(c) permits a court to consider answers to interrogatories in determining if there are genuine issues of fact, this does not mean that self-serving, hearsay conclusions and unauthenticated, uncertified documents attached thereto may be relied on by a court. Only if



the attachments are properly authenticated with a sufficient foundation may a court consider them. The effect of answers to interrogatories is thoroughly discussed in 4A MOORE'S FEDERAL PRACTICE, pp. 33-173 et seq., ¶ 33.29. No broader rule applies to such answers than would be appropriate for the admissibility of answers at a deposition under Rule 32. The Court of Appeals here merely concluded that Responses to Interrogatories came under the hearsay exception under Fed. R. Evid. 803(8), on the ground that "evidence regarding public records need only be within the personal knowledge of a subordinate of the declarant." 724 F.2d at 811, fn.5. There never was any contention or showing that this exception to the hearsay rule applied to these Responses. In no event should it permit the use of documents stapled to the Responses, uncertified and



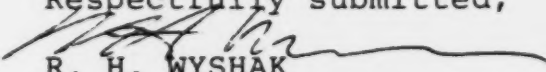
unauthenticated. Written objections thereto were made.

Without these Responses, the District Court would have had to deny the motion for summary judgment, in view of the triable issues of fact as to Zolla's address.

CONCLUSION

The petition for writ of certiorari should be granted in view of the conflicts in the Courts of Appeals and to settle and provide uniform criteria for this important and recurring issue on how IRS should determine a taxpayer's address.

Respectfully submitted,


R. H. WYSHAK
LILLIAN W. WYSHAK

Attorneys for Petitioner

APPENDIX A

APPENDIX

UNITED STATES of America
Plaintiff-Appellee,

v.

Edward M. ZOLLA, Defendant-Appellant.

No. 82-5947

United States Court of Appeals,
Ninth Circuit.

Decided Jan. 24, 1984.

. . .

Appeal from the District Court for the
Central District of California.

Before GOODWIN and TANG, Circuit Judges
and JAMESON, District Judge.*

GOODWIN, Circuit Judge:

Zolla appeals a district court judgment
in favor of the government in its action to
reduce to judgment Zolla's federal income
tax liabilities for 1968 and 1969.

*The Honorable William J. Jameson, Senior
District Judge for the District of Montana,
sitting by designation.

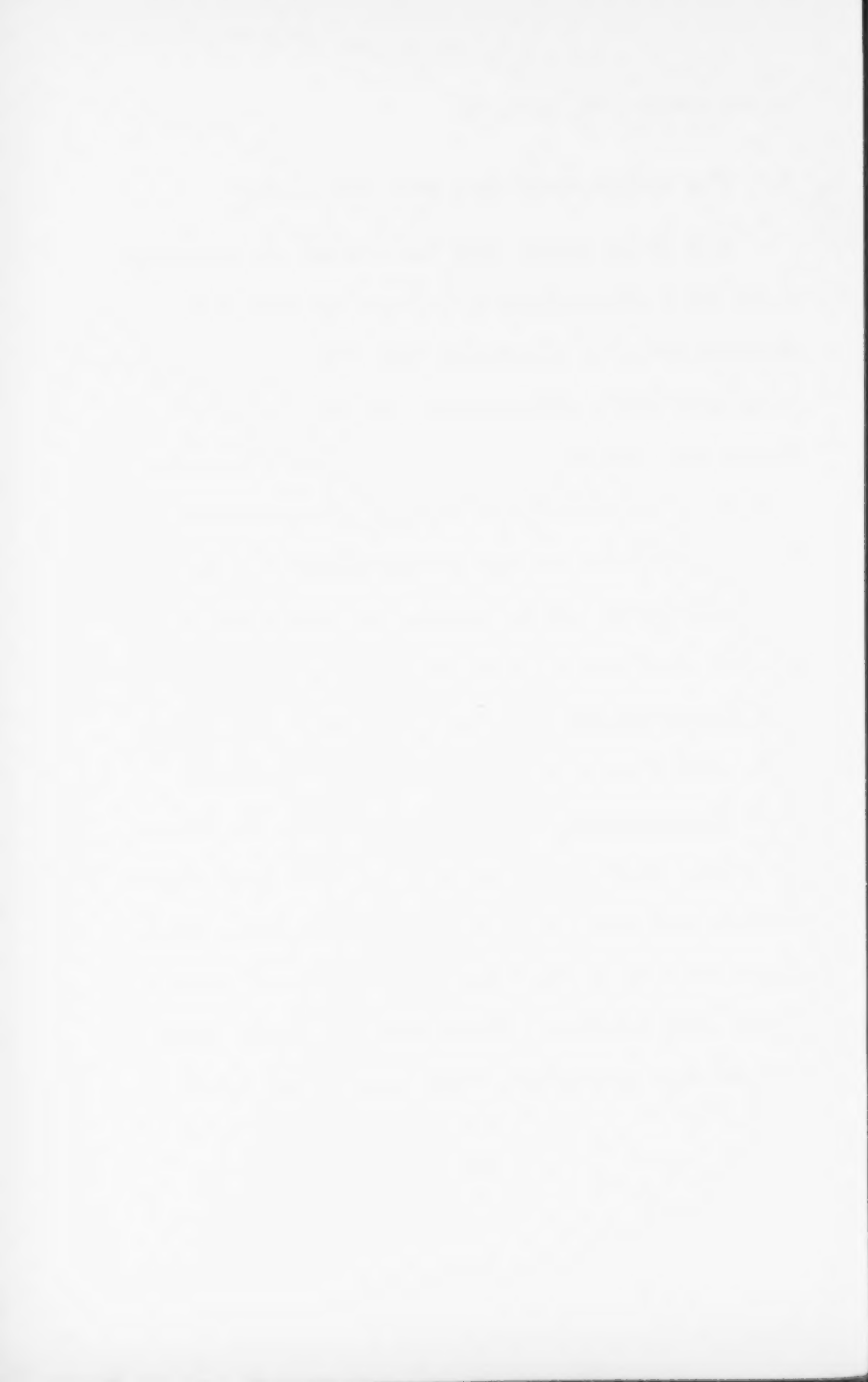


Neither the government nor Zolla introduced direct evidence of Zolla's income and deductions for the years in question. The government relied upon the presumption of correctness that attaches to the IRS's determination of a tax deficiency. See Rockwell v. Commissioner, 512 F.2d 882, 885 (9th Cir.), cert. denied, 423 U.S. 1015, 96 S.Ct. 448, 46 L.Ed.2d 386 (1975). Zolla argued that the presumption of correctness should not apply because: (1) the determination of deficiency was arbitrary; (2) there was insufficient evidence that the Government mailed the statutory notice of deficiency; and (3) that the notice, if sent, was not mailed to his last known address. The district court, finding no genuine issues of material fact, held that the government was entitled to prevail as a matter of law, and entered summary judgment for the

government. We affirm.

A. The Deficiency Was Not Arbitrary

[1] This court has held that no presumption of correctness attaches to deficiency determinations in which the IRS charges a taxpayer with additional income but provides no factual showing that the taxpayer actually received the income in question. To give effect to the presumption in such circumstances would impose on the taxpayer the difficult task of proving a negative. See Weimerskirch v. Commissioner, 596 F.2d 358, 361 (9th Cir. 1979). Zolla contends That Weimerskirch covers his case. He fails to note, however, that all of the 1969 deficiency and part of the 1968 deficiency were based on the disallowance of claimed deductions and credits. There was no doubt that income was received. This court has held



that the Weimerskirch rule does not apply where the deficiency is based on the disallowance of a claimed deduction, because the taxpayer is not required to prove a negative. See Karme v. Commissioner, 673 F.2d 1062, 1065 (9th Cir. 1982). Disallowed credits are indistinguishable in this respect from disallowed deductions.

The remainder of the 1968 deficiency was based on the inclusion of income shown in an unfiled 1968 tax return obtained from Zolla's CPA. The inclusion of those amounts, shown in Zolla's own records, did not lack a factual basis under Weimerskirch.

B. The Government Proved That Notices
Had Been Mailed

[2] The IRS, by established routine, had destroyed all copies of the notices of deficiency and demands for payment that had been mailed to Zolla. The government



submitted postal form 3877 certifying that the notices of deficiency had been mailed and an IRS form certifying that the taxes and the section 6651(a)(3)¹ failure-to-pay penalties had been assessed. Zolla offered no contrary evidence.

We adopt the view of the Eighth Circuit and the Tax Court that these official certificates are highly probative, and are sufficient, in the absence of contrary evidence, to establish that the notices and assessments were properly made. See United States v. Ahrens, 530 F.2d 781, 784-86 (8th Cir. 1976); Cataldo v. Commissioner, 60 T.C. 522, 524 (1973).

1. All statutory references are to the Internal Revenue Code of 1954, Title 26 of the United States Code.



C. The Notices Were Mailed to the Taxpayer's Last Known Address

[3] The IRS must send a notice of deficiency before it may assess, collect, or reduce to judgment most income tax liabilities. § 6213(a). The notice is valid even if not received by the taxpayer, if it is mailed to the taxpayer's last known address.² See § 6212(b)(1); Cool Fuel, Inc. v. Connett, 685 F.2d 309, 312 (9th Cir. 1982).

[4] A taxpayer's last known address is that on his most recent return, unless the taxpayer communicates to the IRS "clear and concise" notice of a change of address. See McPartlin v. Commissioner, 653 F.2d 1185, 1189 (7th Cir. 1981; Alta Sierra Vista, Inc. v. Commissioner, 62 T.C. 367 (1974), aff'd mem, 538 F.2d 334 (9th Cir. 1976).

2. The Government does not contest Zolla's allegation that he did not actually receive the notices.

It is undisputed that the North Bedford Street address to which the notice of deficiency was mailed was the address on Zolla's most recent return.³ Zolla filed a 1970 return in October 1971, showing that address, Zolla did not file a 1971 return. The notice of deficiency was mailed in June 1973. Zolla filed a 1972 return in 1974, showing a new address.

Zolla argues that the IRS had notice of a change of address because, before the notices of deficiency were mailed, an agent in the collection division of the same district office discovered a more recent address

3. Zolla notes that the district court's findings of fact state that the notices were sent to North Beverly Drive. It is clear from the context that this was merely a transcribing error. The certificates clearly show that the notices were mailed to North Bedford Street. In any case, this court can affirm on the basis that the record clearly shows that the notices were mailed to North Bedford Street. See Shipley v. United States, 608 F.2d 770, 773-74 (9th Cir. 1979).



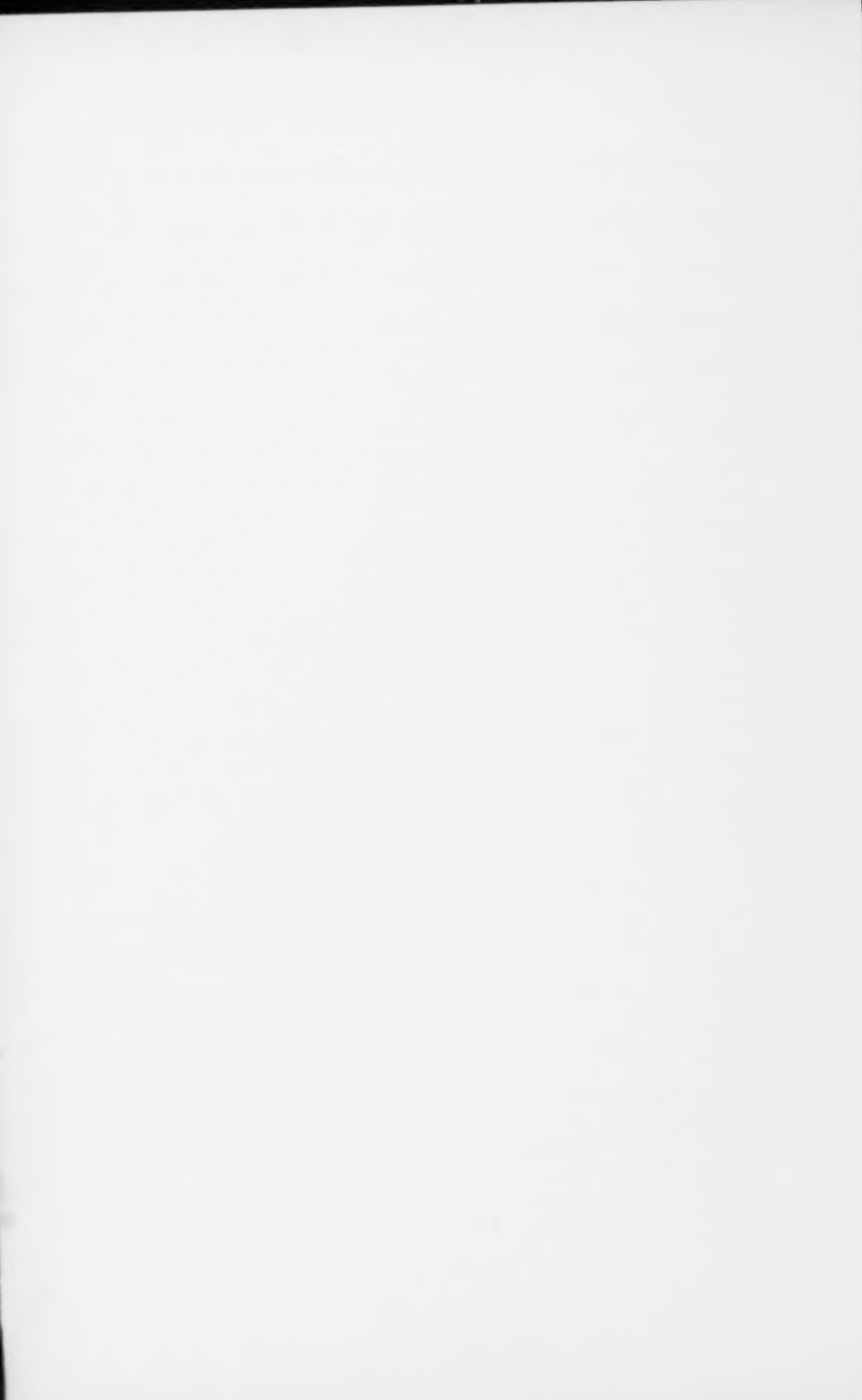
(LaPeer Street) while attempting to collect an unrelated tax liability. The collection agent filed a notice of tax lien showing the LaPeer Street address.

[5,6] We adopt the view of the Tax Court that such information gained by a collector should not necessarily be imputed to the audit agents who mailed the notices of deficiency. Kuebler v. Commissioner, 38 T.C.M. (CCH) 454 (1979). Because a notice of deficiency is invalid if not properly addressed,⁴ and because the statute of limitations will often bar the IRS from later issuing a correct notice if the first is invalid, the IRS could ensure that notices were validly addressed only by systematically recording in

4. Unless, of course, the taxpayer actually receives the notice promptly. See Clodfelter v. Commissioner, 527 F.2d 754, 756-57 (9th Cir. 1975), cert. denied, 425 U.S. 979, 96 S.Ct. 2184, 48 L.Ed.2d 806 (1976).



a central file all address information acquired in any fashion. We decline to require the IRS to do that. First, it would impose an unreasonable administrative burden on the IRS. Second, where the taxpayer himself did not communicate the change of address to the IRS, the taxpayer would not be estopped from arguing that a change of address noted by the IRS was incorrect. This could happen, for instance, if the IRS took notice of a temporary change of address. A notice of deficiency sent to a temporary address is invalid unless actually received. Cf. Cohen v. United States, 297 F.2d 760, 773 (9th Cir.), cert. denied, 369 U.S. 865, 82 S.Ct. 1029, 8 L.Ed.2d 84 (1962). If we require the taxpayer to communicate a change of address clearly and concisely, we may fairly find that the taxpayer is bound by the information the IRS receives.



[7] Zolla also contends that the IRS had notice of a change in address because the LaPeer Street address was in one of the IRS computer files. The argument is not supported by the record. Contrary to Zolla's assertion, the collection agent did not state that he discovered the LaPeer Street address from the computer files. Furthermore, the IRS's answers to Zolla's interrogatories stated that North Bedford Street was the most recent address in the district, regional, and national IRS computer files at the time the notices were mailed. Zolla did not controvert this sworn statement.⁵

5. Zolla contends that the district court erred in relying upon the evidence because it was contained in answers to interrogatories that could not properly be considered on summary judgment. He argues that Fed.R.Civ.P. 56(c), (e) permits the consideration of answers to interrogatories only if they are admissible and made upon personal knowledge.

(cont.)



Zolla does not allege that he made any attempt to advise any IRS office or the auditing agents of his numerous changes of address. Nor did Zolla effectively controvert the sworn statement that the address to which the notices were sent was the most recent shown in the IRS computer files. On this record, the address on Zolla's most recent return was his last known address as a matter of law, and the district court did

5. (cont.) See S. & S. Logging Co. v. Barker, 366 F.2d 617, 624 n. 7 (9th Cir. 1966). The answers were not properly considered, he argues, because they were not made upon the agent's personal knowledge. But the contents of the answers in the present case are admissible under the public records exception to the hearsay rule. Fed. R.Evid. 803(8). Although they were not made upon the personal knowledge of the declarant, the personal knowledge requirement is satisfied because this court has held that evidence regarding public records need only be within the personal knowledge of a subordinate of the declarant. See United States v. Hudson, 479 F.2d 251, 253-55 (9th Cir. 1972), cert. denied, 414 U.S. 1012, 94 S.Ct. 377, 38 L.Ed.2d 250 (1973); LaPorte v. United States, 300 F.2d 878, 882 (9th Cir. 1962).

not err in entering summary judgment for
the government.

Affirmed.

APPENDIX B

F I L E D
MAR 05 1984
Phillip B. Winberry
Clerk,
U.S. Court of Appeals
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF)	
AMERICA,)	No. 82-5947
)	
Appellee,)	DC No. CV 79-4309 MRP
)	
vs.)	<u>O R D E R</u>
)	
EDWARD M. ZOLLA,)	
)	
Appellant.)	

Before: GOODWIN and TANG, Circuit Judges,
and JAMESON*, District Judge

Appellant's petition for rehearing
is denied.

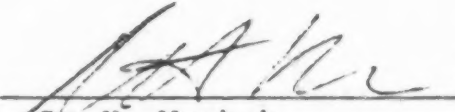
*The Honorable William J. Jameson, Senior
District Judge for the District of Montana,
sitting by designation.



CERTIFICATE OF SERVICE

I, R. H. Wyshak, a member of the bar of this Court and counsel of record for petitioner, hereby certify that I served the within Petition by mailing three copies to the Solicitor General, Department of Justice, Washington D.C. 20530 on June 1 , 1984 in a duly addressed envelope, first class postage prepaid.

June 1 , 1984



R. H. Wyshak

2

83 - 2019

Office - Supreme Court, U.S.
FILED
JUN 1 1984
ALEXANDER L. STEVAS.
CLERK

No. _____

**IN THE
SUPREME COURT
OF THE UNITED STATES**

October Term, 1984

EDWARD M. ZOLLA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**SUPPLEMENTAL APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT**

**ROBERT H. WYSHAK
LILLIAN W. WYSHAK
8907 Wilshire Boulevard
Beverly Hills, CA 90211
(213) 273-2044**

Attorneys for Petitioner

19pp

APPENDIX C

F I L E D

JUN 30 1982

Clerk, U.S. District
Court
Central District of
California

By

Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF)	
AMERICA,)	CASE NO. CV 79-4309
)	MRP
Plaintiff,)	
)	FINDINGS OF FACT
vs.)	AND CONCLUSIONS
)	OF LAW
EDWARD M. ZOLLA,)	
)	
Defendant.)	
)	

The motion of plaintiff, the United States of America, for summary judgment came on regularly for hearing before the Honorable Mariana R. Pfaelzer on February 9, 1981. The Court, having read the papers filed and considered the oral arguments presented, issues the following Findings of Fact and Conclusions of Law.



FINDINGS OF FACT

1. Plaintiff, the United States of America, filed this suit to recover unpaid federal income taxes, interest, and penalties for the 1968, 1969, 1974, and 1975 taxable years of defendant, Edward M. Zolla. On September 11, 1980, partial summary judgment was granted in favor of the plaintiff as to defendant's 1974 and 1975 taxable years. Plaintiff's motion as to defendant's 1968 and 1969 taxable years was denied, without prejudice. Plaintiff has now renewed its motion for summary judgment for defendant's 1968 and 1969 income taxes.

2. Defendant did not file a federal income tax return and did not make estimated tax payments for the calendar year 1968.

3. On December 10, 1973, a delegate of the Secretary of the Treasury made an assessment against the defendant for unpaid

1968 federal income taxes, interest, and penalties in the amount of \$30,815.62. The assessment resulted from an examination of the defendant's 1968 taxable year by the Office of the District Director of Internal Revenue, Los Angeles.

4. The December 10, 1973 assessment consisted of the following:

Unpaid 1968 income taxes	\$19,740.00
Interest	5,509.62
Penalty imposed for failure to file a timely federal income tax return	4,935.00
Penalty imposed for failure to pay estimated taxes	<u>631.00</u>
Total Assessment	\$30,815.62

5. Prior to making the December 10, 1973 assessment, a Statutory Notice of Deficiency was sent by certified mail to the defendant on June 11, 1973 at 902 North Bedford Drive,

Beverly Hills, California.

6. On December 10, 1973, notice and demand for payment of the assessment were made upon the defendant.

7. On January 10, 1978, a credit of \$33.93 was applied against the December 10, 1973 assessment.

8. The defendant has failed to pay the \$30,781.69 unpaid balance of his 1968 federal income tax liability plus accrued interest and penalties.

9. On June 26, 1970, the defendant and his wife, Betty Zolla, filed an untimely joint federal income tax return for their 1969 calendar year. The return reported a tax of \$1,201.00

10. A credit for federal income tax withheld of \$655.20 was claimed on the return and allowed, resulting in a balance due of \$545.80. The balance was subsequently paid together with assessed penalties plus interest

for failure to file the return and to pay the balance due in a timely fashion.

11. On November 12, 1973, a delegate of the Secretary of the Treasury made an assessment against the defendant for unpaid 1969 federal income taxes, interest, and penalties totalling \$44,902.50. The assessment resulted from an examination of the defendant's 1969 taxable year by the Office of the District Director of Internal Revenue, Los Angeles.

12. The November 12, 1973 assessment consisted of the following:

Unpaid 1969 income taxes	\$32,905.00
Interest	7,061.50
Penalty imposed for failure to file a timely federal income tax return	4,936.00
	<hr/>
Total assessment	\$44,902.50

13. Prior to making the November 12, 1979 assessment, a Statutory Notice of Deficiency



was sent by certified mail to the defendant on June 11, 1973 at 902 North Bedford Drive, Beverly Hills, California.

14. On November 12, 1973, notice and demand for payment were made upon the defendant.

15. On December 19, 1978, a payment of \$23.42 was applied against the November 12, 1973 assessment.

16. The defendant has failed to pay the unpaid balance of \$44,879.08 on his 1969 federal income tax liability, plus accrued interest and penalties.

17. Defendant filed his 1970 federal income tax return on October 27, 1971 and recorded his address on it as 902 North Bedford Drive, Beverly Hills, California.

18. Defendant did not file a federal income tax return for 1971.

19. Defendant filed his 1972 federal income tax return in 1974 and listed his

address as 349 South Linden Drive, Beverly Hills, California.

20. On July 25, 1972, defendant was visited by tax liability Revenue Officer Leslie at 303 North La Peer Drive, Beverly Hills. The point of Officer Leslie's visit was to try to collect delinquent employment taxes.

21. To the extent that any Conclusions of Law are deemed to be Findings of Fact, they are incorporated into these Findings of Fact.

CONCLUSIONS OF LAW

1. To the extent that any Findings of Fact are deemed to be Conclusions of Law, they are incorporated into these Conclusions of Law.

2. This Court's jurisdiction is based on 26 U.S.C. § 7402(a) and 28 U.S.C. §§ 1340 and 1345.

3. Venue lies within the Central District of California as the district in which the defendant resides. 28 U.S.C. § 1396.

4. A taxpayer's "last known address" for the purposes of 26 U.S.C. § 6212(b) is "the taxpayer's last-permanent address or legal residence known by the Commissioner or the last known temporary address of a definite duration to which the taxpayer has directed the Commissioner to send all communications." Alta Sierra Vista, Inc. v. Commissioner, 62 T.C. 367 (1974). aff'd mem., 538 F.2d 334, (9th Cir. 1976).

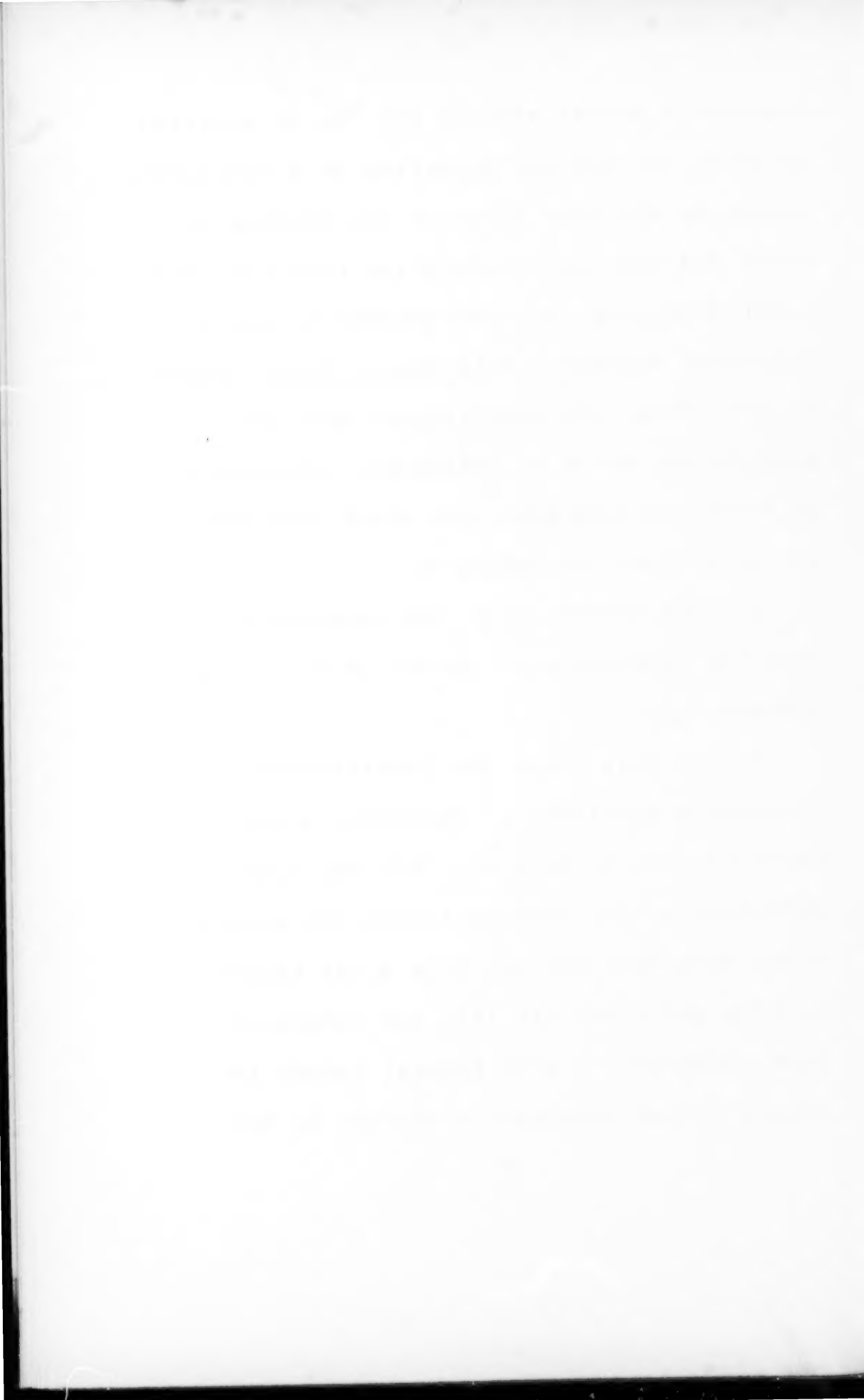
5. Section 6212(b) does not provide that the Commissioner must send notice to the taxpayer's actual current address. All the Commissioner must do is send the notice of deficiency to the address which he reasonably believes is the taxpayer's current address. The Commissioner must exercise "reasonable diligence" in ascertaining the



taxpayer's actual address but "he is entitled to treat the address appearing on a taxpayer's return as the last known in the absence of clear and concise notification from the taxpayer directing the Commissioner to use a different address." Alta Sierra Vista, supra, at 374. Thus, the Commissioner must only send notice which is reasonably calculated to reach the taxpayer, but which need not actually reach the taxpayer.

6. The burden is on the taxpayer to keep the Commissioner advised of his current address. Id.

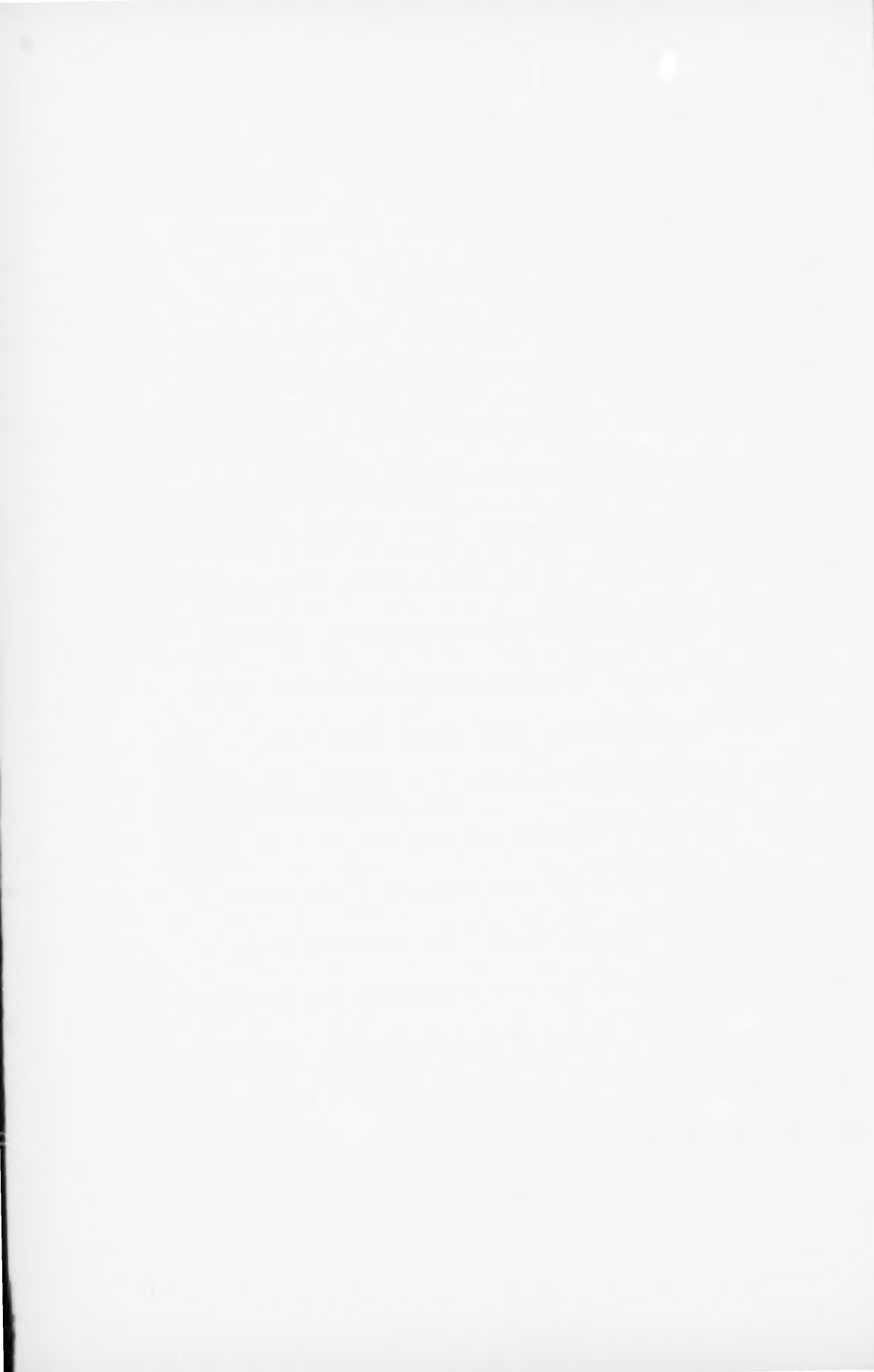
7. In this case, the Commissioner's reasonable knowledge of defendant's last known address on June 11, 1973 was from defendant's 1970 federal income tax return since defendant did not file a tax return in 1971 and filed his 1972 tax return in 1974. Defendant's 1970 federal income tax return listed defendant's address as 902



North Beverly Drive, Beverly Hills,
California.

8. The visit of Revenue Officer Leslie on July 25, 1972 to defendant's residence at 303 North La Peer Avenue, Beverly Hills, California to collect delinquent employment taxes does not impute knowledge on the Audit Division of this address of defendant's. Kuebler v. Commissioner, 1979 - 425 Tax Ct. Mem. Dec. (P.-H.) ¶ 79.095 (1979) (Collection division's knowledge of taxpayer's current address does not charge audit division with the same knowledge). See also Alta Sierra Vista, supra, at 376-377.

9. In the absence of copies of the statutory notices of deficiency, the Commissioner may prove that the necessary notices were sent to the taxpayer by proffering Post Office Form 3877. Form 3877 shows that the notices of deficiency were sent by certified mail to the taxpayer's last



known address. United States v. Ahrens,
530 F.2d 781 (8th Cir. 1976). The forms
submitted by plaintiff in this case satis-
factorily prove that plaintiff sent defen-
dant the necessary notices.

10. The Commissioner has offered "foun-
dational support" for defendant's deficiency
determination and, therefore, a "presumption
of correctness" attaches to it. Weimerskirch
v. Commissioner, 596 F.2d 358 (9th Cir. 1979).
The burden was on the defendant to prove
that the plaintiff's tax assessment is
erroneous. He has not carried that burden
and has failed to show that a genuine issue
of material fact exists with respect to his
liability for his unpaid 1968 and 1969
federal income tax liabilities.

DATED: June 28, 1982

/s/ Mariana R. Pfaelzer

Mariana R. Pfaelzer
United States District Judge

APPENDIX D

and

JUN 30 1982

Central District of
California

1444-A U.S. Courthouse
312 N. Spring St.
Los Angeles, CA 90012
Telephone: (213) 688-2455
or 2410

By _____ Deputy _____

CENTRAL DISTRICT OF CALIFORNIA

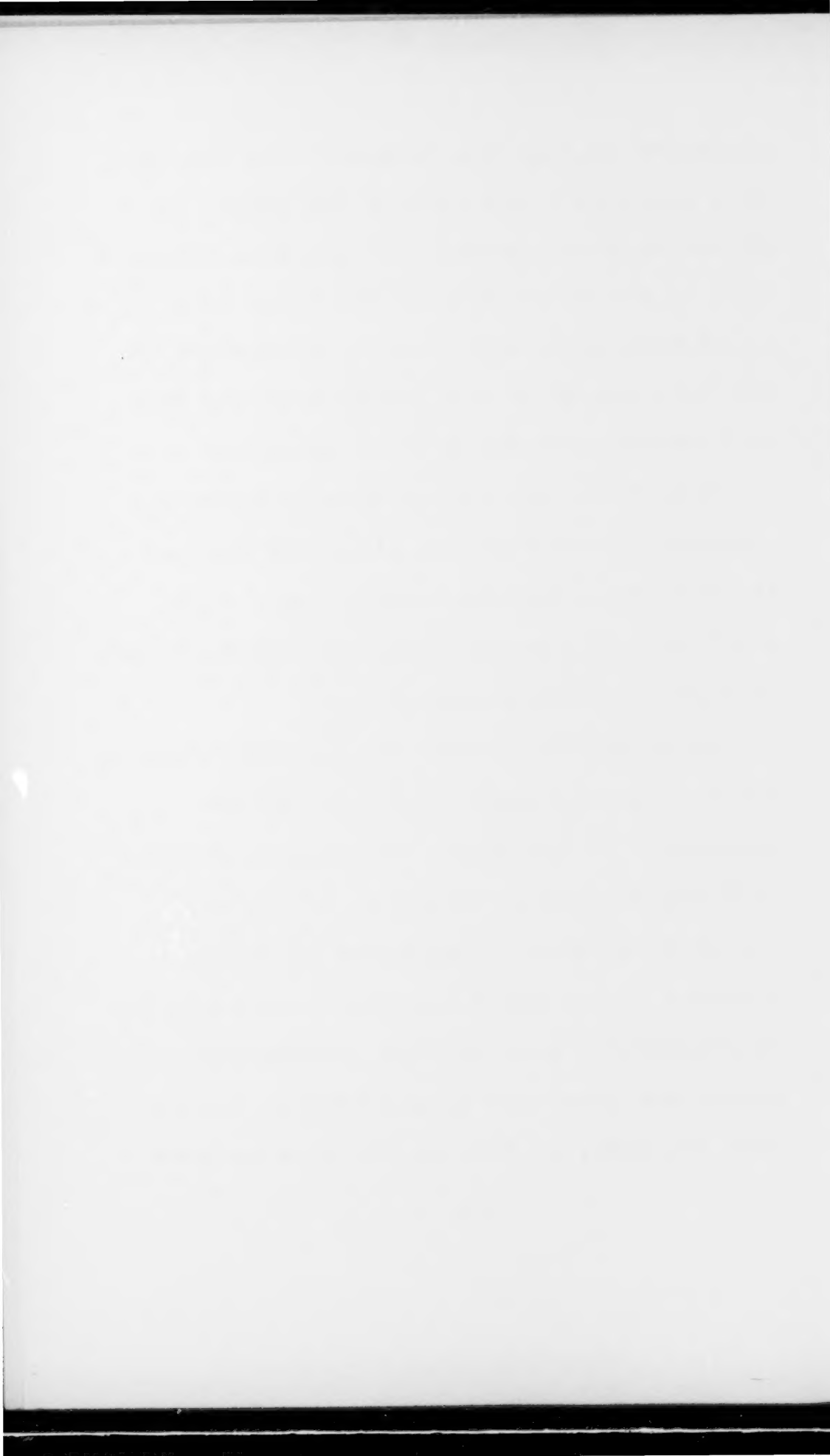
UNITED STATES OF) NO. CV 79-4309-MRP
AMERICA,)
)
Plaintiff,) SUMMARY JUDGMENT FOR
)
vs.) THE TAXABLE YEARS
)
EDWARD M. ZOLLA,) 1968 and 1969
)
Defendant.)

d1

plaintiff against the defendant for the taxable years 1974 and 1975 in the amount of \$7,088.85 plus accrued interest from August 2, 1980 to the entry date at the daily rate of \$1.49 plus costs and interest thereafter on the full amount of the judgment at the rate of 7 percent per annum until satisfied.

This Court now having granted summary judgment in favor of the plaintiff against the defendant for the taxable years 1968 and 1969, and having filed herewith findings of fact and conclusions of law.

IT IS HEREBY ORDERED AND ADJUDGED that for the taxable years 1968 and 1969 the plaintiff, United States of America, recover from the defendant, Edward M. Zolla, the sum of \$124,965.77 (consisting of unpaid assessed income taxes, interest and penalties of \$75,660.77, plus accrued, unassessed interest and penalties as provided by law to June 25, 1982, of \$49,305.00) plus accrued



interest from June 26, 1982, to the date of entry of this judgment at the daily rate of \$34.56 plus its costs of suit of _____.

Interest on the full amount of this judgment shall accrue at the rate of seven percent (7%) per annum until satisfied.

DATED: This 28 day of June, 1982.

/s/ Mariana R. Pfaelzer

MARIANA R. PFAELZER
UNITED STATES DISTRICT JUDGE

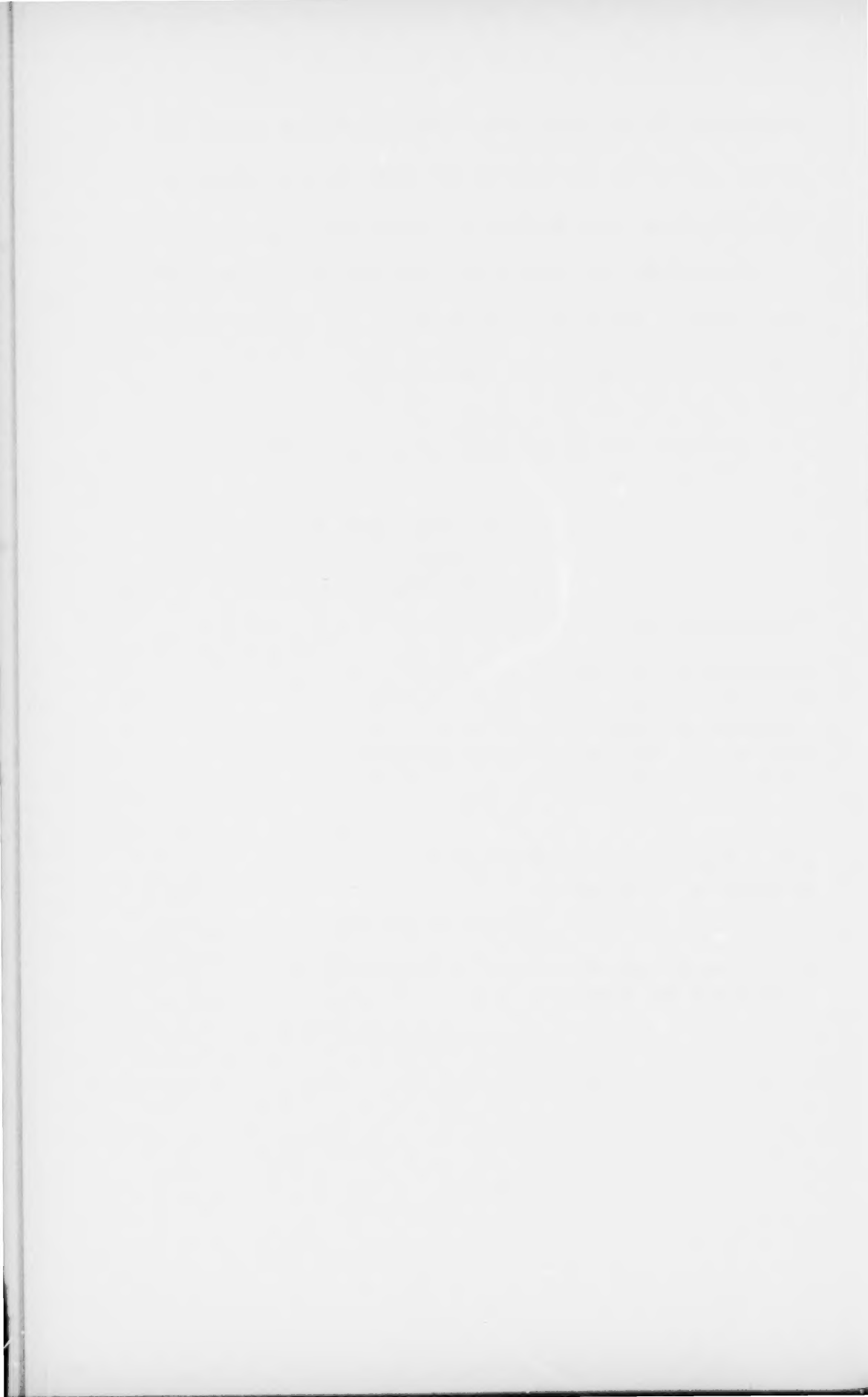
PRESENTED BY:

STEPHEN S. TROTT
United States Attorney
CHARLES H. MAGNUSON
Assistant United States Attorney
Chief, Tax Division

/s/ Arthur M. Greenwald

ARTHUR M. GREENWALD
Assistant United States Attorney

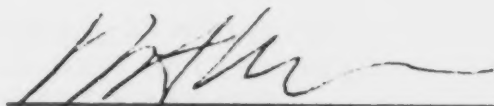
Attorneys for Plaintiff, United
States of America



CERTIFICATE OF SERVICE

I, R. H. Wyshak, a member of the bar of this Court and counsel of record for petitioner, hereby certify that I served the within Supplemental Appendix by mailing three copies to the Solicitor General, Department of Justice, Washington, D.C. 20530 on June 8, 1984 in a duly addressed envelope first class postage prepaid.

June 8, 1984



R. H. Wyshak